No. 84-780

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In The

Supreme Court of the United States

October Term, 1985

Margaret M. Heckler, Secretary of Health and Human Services, *et al.*,

Appellants,

v.

Stephen J. Roy, *et al.*,

Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLEES

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MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*,

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v.

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BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League) is a non-profit voluntary association, national in membership, organized to promote good will and harmonious relations in the community, to combat all forms of religious prejudice and discrimination and to defend the right to life of all, born and pre-born. To fulfill these purposes the League frequently files amicus curiae briefs in cases, such as this one, involving the free exercise of religion. The League's objective is to further each person's right to freely exercise their religious beliefs.

The League has obtained written permission to file this brief from the counsels of record for the parties in this case. These letters have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The individual's freedom of conscience is the central liberty that unifies the various Clauses in the First Amendment. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2487 (1985). This policy could perhaps be served best by a limited interpretation of both the Free Exercise and Establishment Clauses. However, because this Court has broadly construed the Establishment Clause, protection of religious conscience requires a similarly broad construction of the Free Exercise Clause.

The Court's expansive construction of the Establishment Clause has not assisted and has actually impeded protection of religious individuals' exercise of their rights of conscience. Although preservation of rights of conscience is the predominant policy underlying the Establishment Clause, the Court has not used this interest to regulate its application of that clause. This has resulted in Establishment Clause precedent which has had a negative, rather than positive effect upon religiously-oriented individuals' exercise of rights of conscience. This problem has been aggravated by the popular perception that this Court's application of the Establishment Clause precludes meaningful legislative accommodation of religiously-oriented individuals' rights of conscience.

In light of the practical difficulties this Court's Establishment Clause precedent has imposed upon religiously-oriented individuals' exercise of their rights of conscience, vigorous judicial enforcement of the Free Exercise Clause is necessary for the protection of religious individuals' exercise of these rights. The Court's relatively expansive application of the Free Exercise Clause has proven very suitable to this purpose. Features of this Court's Free Exercise Clause interpretation which help to protect religious individuals' exercise of their rights of conscience are the direction of Free Exercise Clause precedent to the prevention of governmental coercion on religious exercise, the insulation of protection of religious conscience under the Free Exercise Clause from the rigorous Establishment Clause scrutiny which often attends legislative protection of these rights and the presence of Free Exercise Clause protection irrespective of the lack of

legislative action on behalf of the involved religious group. This Court's Free Exercise Clause precedent also results in flexible, individually-oriented accommodation of religious exercise with legitimate governmental needs. Such an individually-oriented approach should be continued in this case. Unlike Free Speech cases in which an "accommodation" might require a forum to be open to a wide variety of speakers, a finding of "accommodation" under the Free Exercise Clause does not normally involve "accommodations" for persons other than those with specific religious objections to a governmental requirement. Further, this individually-oriented approach properly permits consideration of the number of individuals seeking an accommodation in determining whether there exists a compelling governmental interest sufficient to outweigh the proposed accommodation.

ARGUMENT

INTRODUCTION

This case gives this Court the opportunity to again consider the scope of protection the Free Exercise Clause affords individuals. Justice Rehnquist's dissent in *Thomas v. Review Board*, 450 U.S. 707, 720-727 (1981) criticized the expansive scope of protection afforded under this clause. However, amicus submits that the expansive interpretation this Court has given the Establishment Clause requires a correspondingly expansive interpretation for the Free Exercise Clause. A more limited interpretation of both clauses might best serve governmental interests and religious liberty interests. However, if the Establishment Clause is afforded a broad construction, satisfactory protection of religious liberty requires an equally broad construction of the Free Exercise Clause.

I.

AS A PRACTICAL MATTER, THIS COURT'S BROAD CONSTRUCTION OF THE ESTABLISHMENT CLAUSE HAS NOT ASSISTED AND HAS ACTUALLY IMPEDED PROTECTION OF RELIGIOUS INDIVIDUALS' EXERCISE OF THEIR RIGHTS OF CONSCIENCE.

This Court has "identified the individual's freedom of conscience as the central liberty that unifies the various clauses in the First Amendment." *Wallace v. Jaffree*, 105 S. Ct. 2479, 2487 (1985) (citation omitted). In its recent constructions of the Establishment Clause, the Court has noted that the Establishment Clause's purpose is to protect these rights of individual conscience. For example, in *Jaffree* the application of the Establishment Clause to a state "moment of silence" statute was prefaced by a discussion of the need to protect rights of conscience of those of all faiths and those of no faith. 105 S. Ct. at 2488-2489. Similarly, in *Grand Rapids School District v. Ball*, 105 S. Ct. at 3216, 3222 (1985), this Court justified the Establishment Clause largely as a means to protect the rights of religious conscience of those who do not conform to the religious norm. The Court noted:

> For just as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects that have from time to time achieved dominance. The solution to this problem adopted by the Framers and consistently recognized by this Court is jealously to guard the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and non-religion. Only in this way can we "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary" and "sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 72 S. Ct. 679 (1952).[1]

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[1] *Grand Rapids School District*, 105 S. Ct. at 3222. This Court also noted that its concern with rights of religious conscience underlay its application of the Establishment Clause in *Grand Rapids'* companion case, *Aguilar v. Felton*, 105 S. Ct. 3232, 3237 (1985).

Although this Court has isolated freedom of religious conscience as the primary value underlying the Establishment Clause, application of this Clause has not been guided by determinations of whether a decision will aid the exercise of rights of religious conscience. In *Engel v. Vitale*, 370 U.S. 421, 430 (1962), the Court noted that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." Predictably, this Court's failure to utilize the underlying interest of freedom of religious conscience to regulate its application of the Establishment Clause has resulted in decisions which, in practice, have not effectively and equally protected the rights to freedom of religious conscience of all individuals.

The Establishment Clause has most effectively been used to prevent governmental assistance to those who have professed religious beliefs. A simple survey of the Court's Establishment Clause cases since *Everson v. Board of Education*, 330 U.S. 1 (1947), reveals a clear pattern of utilization of the Establishment Clause to prevent any significant governmental aid or assistance to individuals or institutions who profess religious beliefs. However, this history is almost devoid of examples in which persons of religious conscience have been able to utilize the Establishment Clause to prevent government advanced hostility to their religious beliefs. In this case, for example, despite the clear hostility of a social security number requirement to Roy's Abenaki religion, it would be difficult to perceive of this Court seriously treating this matter as an Establishment Clause violation.

The import of this Court's Establishment Clause cases, however, extends beyond the Court's simple failure to affirmatively utilize the Establishment Clause as a vehicle to advance religiously-motivated individuals' rights of conscience. Because the Establishment Clause's policy of protection of individual rights of conscience has been largely disregarded in favor of mechanistic reversal of provisions "aiding" religion, this Court has generally failed to adequately con-

sider the adverse effects of its Establishment Clause decisions on the very rights of freedom of conscience held to underlie the Establishment Clause. For example, the *Jaffree* decision may have limited the exercise of religiously-motivated individuals' rights of conscience far more than the invalidated statute had limited the rights of conscience of the non-religious individual who brought the action. Similarly, the *Grand Rapids* and *Aguilar* may create a hardship on religiously-motivated parents' exercise of their rights of conscience far exceeding the invalidated programs' infringement upon anyone's rights of conscience. Likewise, the Court's decision in *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. at 2914 (1985), may have a negative effect upon the exercise of the rights of conscience of Sabbatarians greatly exceeding any negative effect protection of Sabbatarian rights had upon the exercise of rights of conscience of non-Sabbatarians. In short, this Court's vigorous and expansive application of the Establishment Clause to invalidate programs benefitting religiously-motivated individuals, without thorough consideration of the impact of these decisions upon the rights of conscience of religiously-oriented individuals, has resulted in a situation in which the Establishment Clause's application has not only failed to affirmatively aid religiously-oriented individuals' rights of conscience, but may well have interfered with such rights.

The true problem, however, may not be the actual effect of Establishment Clause decisions upon these rights of conscience. Establishment Clause objections might well be avoided in each of these cases by legislation drawn carefully in response to this Court's decisions. However, the real difficulty probably lies in legislative and public opinion which, influenced by the tone of this Court's decisions, concludes that legislation to aid the religious individual's exercise of religious conscience violates the "separation of church and state." Legislators understandably fear that their efforts to accommodate the rights of conscience of religiously-oriented individuals will lead to adverse court decisions with accompanying attorney's fees awards.

In short, the Court's expansive application of the Establish-

ment Clause to suppress governmental aid to religiously-oriented individuals, combined with its failure to apply the clause in a similarly expansive fashion to the establishment of irreligion, has required that religiously-oriented individuals find a means to protect their rights of religious conscience which will be immune from Establishment Clause scrutiny. Fortunately, the Free Exercise Clause, as interpreted by this Court's decisions, provides just this type of effective protection of rights of religious conscience.

II.

IN LIGHT OF THE PRACTICAL RESULTS ARISING FROM THIS COURT'S ESTABLISHMENT CLAUSE PRECEDENT, VIGOROUS JUDICIAL ENFORCEMENT OF THE FREE EXERCISE CLAUSE IS NECESSARY FOR THE PROTECTION OF RELIGIOUS INDIVIDUALS' EXERCISE OF THEIR RIGHTS OF CONSCIENCE.

In sharp contrast to this Court's application of the Establishment Clause, this Court's application of the Free Exercise Clause has provided immeasurable assistance to religious individuals' exercise of rights of religious conscience. The Free Exercise Clause has proven to be a most worthwhile tool in defending individuals, in a judicial setting, from governmental actions which contravened their rights of religious conscience. Examples of this Court's willingness to use the Free Exercise Clause to affirmatively protect religious individuals' exercise of rights of conscience include protection of several Amish parents' rights to educate their children in accordance with their religious beliefs, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), a Sabbatarian's right to receive unemployment benefits without compromising religious beliefs, *Sherbert v. Verner*, 374 U.S. 398 (1963) and a Jehovah's Witness' right to receive unemployment benefits without continuing to work in a religiously objectionable setting, *Thomas v. Review Board*, 450 U.S. 707 (1981).

The interpretation of the Free Exercise Clause found in these cases has a number of attributes which are most

beneficial to religious individuals' exercise of their rights of conscience. First, and most importantly, Free Exercise adjudication has been closely tied to the prevention of direct, governmental action which exhibits a coercive effect upon religious exercise. *See Engel v. Vitale*, 370 U.S. 421, 430 (1962). Thus, the religiously-oriented individual can simply point to coercion suffered and receive protection, without relying upon Establishment Clause precedent with its historic anti-religious slant.

Nearly as important for the individual bringing a Free Exercise claim is the insulation such claims have enjoyed from rigid Establishment Clause scrutiny. While state legislation designed to protect a Sabbatarian's rights might be held to run afoul of the Establishment Clause, a Sabbatarian can enjoy protection under the Free Exercise Clause without concern over whether such protection violates the Establishment Clause.[9] Indeed, in his dissent in *Thomas*, 450 U.S. at 724-726, Justice Rehnquist observed that a thorough application of the Court's Establishment Clause precedent might not have permitted a voluntary (legislative) accommodation of the type the *Thomas* court held mandated by the Free Exercise Clause. Thus, while a person enjoying legislative protection of his exercise of rights of religious conscience might worry about the vulnerability of his protection under the Establishment Clause, the person enjoying comprehensive judicial protection under the Free Exercise Clause receives protection geared to his individual needs without worry that his protection could be found to be an impermissible establishment of religion.

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[9] *Compare Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914 (1985) with *Sherbert v. Verner*, 374 U.S. 398 (1963). Although *Estate of Thornton* involved a statute applicable to private sector employment and *Sherbert* involved regulations governing state unemployment benefits, this distinction did not appear central to this Court's decision in *Thornton*. A reading of the language of the *Thornton* Court would indicate that its rationale might well be applied to state programs providing the same type of absolute protection to the rights of conscience of religiously-motivated individuals.

Judicial protection under the Free Exercise Clause is also a superior means of protecting religious beliefs because it does not require the religiously-motivated individual to wait for legislative action on his behalf. Instead, a means is always readily available for the religiously-oriented individual to protect his rights to free religious exercise. This is particularly important for members of small religious minorities, such as the Abenakis involved in this matter who might not receive suitable legislative action on their behalf.

The final significant positive attribute of this Court's Free Exercise precedent is its flexible, individually-oriented accommodation of religious exercise to legitimate governmental needs. In this case the Government has attacked this type of approach in favor of a more "program" oriented approach. Amicus, however, asserts that an individual, rather than programmatic, approach is most suitable to resolution of this matter.

Initially, the Government's utilization of Free Speech precedent to support a programmatic approach is unpersuasive. Unlike public forum determinations in free speech cases, in which a finding of constitutional protection subjects governmental interests to impositions far beyond those represented by the particular plaintiff, a Free Exercise Claim will normally involve balancing the interests of the state with the needs of a specific, religiously-motivated individual or a discrete group of religiously-motivated individuals. While a Free Speech claim would open a forum to all interested speakers, a Free Exercise claim would only require accommodation of individuals sharing the same type of religious convictions as those involved in a particular case. Thus, contrary to the Government's implication, it does not necessarily follow that the accommodation of certain individuals' rights of conscience will require universal accommodation.

The Court's individually-oriented approach to the Free Exercise Clause also properly considers the number of persons requesting an exemption from generally applicable legislation in determining the propriety of an exemption. If only a few persons would ever request a particular exemption, this would certainly seem relevant to the determination of the

compelling character of a governmental interest. Unless the interest were truly one requiring an "exceptionless" system, *see U.S. v. Lee*, 455 U.S. 252, 258-261 (1982), this factor would be useful to determining the compelling nature of the governmental interest justifying denial of an accommodation. Contrary to the Government's suggestion, this does not necessarily mean that members of large religious groups will enjoy lesser Free Exercise protection than members of smaller groups. Initially, a larger group's concerns likely will have been taken into account in the legislative process. This means that laws of general application will less frequently conflict with such widespread interests. Further, the imposition upon a large number of people, with its possible adverse effect upon program compliance, will lessen the likelihood that governmental interests would outweigh widely held conflicting religious interests. Since widespread, religiously-based resistance to a governmental program would make the governmental program less workable, while at the same time increasing the scope of the imposition upon free exercise of religion, it would seem likely that programs imposing on the religious conscience rights of large numbers would encounter significant Free Exercise problems which might require invalidation of offensive aspects of the program irrespective of the ease of accommodation.

In short, the Free Exercise Clause provides an efficacious method for judicial protection of rights of religious conscience on an individualized basis. It should continue to be interpreted in a flexible manner which recognizes the individualized character of the protection involved and the central importance of the religiously-motivated individual's rights of conscience. Since religiously-motivated individuals' rights of conscience may be infringed upon, rather than aided by rigid application of Establishment Clause precedent, the continued vitality of the Free Exercise Clause is exceedingly important to the preservation of the individual rights of conscience which underlie each of the different clauses of the First Amendment.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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